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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 21, 22 and 32

THE UNITED GAS IMPROVEMENT COMPANY, ET AL.,
Petitioners,
v.
CALLERY PROPERTIES, INC., ET AL.,
Respondents.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,
v.
CALLERY PROPERTIES, INC., ET AL.,
Respondents.

FEDERAL POWER COMMISSION,
Petitioner,
v.
CALLERY PROPERTIES, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING OF THE SUPERIOR OIL COMPANY, J. R. FRANKEL, ET AL., AND J. RAY McDERMOTT & CO., INC.

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Petitioners herein, designated "Superior" for convenience, petition this Honorable Court for rehearing of its decision and judgment rendered herein December 7, 1965. This decision puts the gas producing industry in an administrative straitjacket, which undoubtedly will hamper expansion and even imperil its life.

*R. R. Frankel, L. R. Frankel, Mae Frankel Shalett, H. T. Shalett, and the Estate of Maurice Frankel, dec'd.

A. This Court erred in reversing the court below.

1. The plight of the gas industry is most serious and its prospects are dark indeed. In *Federal Power Commission* v. *Texaco Inc.*, 377 U.S. 33, this Court held that the Commission might by rule preclude hearing of any application based on a contract with indefinite pricing. The rule was held to prescribe only qualifications for an applicant without reaching the merits of the application, and such applicant could always seek waiver of the rule. The basis of the holding was to reduce the administrative burden of a "vast proliferation of hearings". In *Federal Power Commission* v. *Hunt*, 376 U.S. 515, this Court held that the Commission, without any hearing under Section 7, might condition downward a price in a temporary authorization and preclude any price increase for the period of temporary authorization. This, because of the "broad discretionary power in the Commission to condition temporary certificates • • • vital to its ability to hold the line in pricing." Here it is held that a Section 7 hearing for a *permanent* certificate by a *qualified applicant* need not involve consideration of relevant evidence bearing on present or future public convenience and necessity but may be limited to a showing of only the level of prices at which "substantial amounts" of gas have been certificated in other proceedings,[1] so long as they are not subject to judicial review or "in any way suspect" because consideration of all relevant evidence would be an administrative burden and require a "considerable expenditure" of Commission manpower. It is respectfully submitted that with this series of cases, Section 7 of the Natural Gas Act which requires a hearing on all applications, and which requires certification of any qualified applicant proposing a service shown at the hearing to

[1] Applicants' participation or not, the evidence, or other considerations, in such proceedings apparently are immaterial.

be required by present or future public convenience and necessity, has been emasculated on the sole basis of administrative convenience and discretion.

2. The present holding is contrary to the requirements of the Natural Gas Act[2], the Administrative Procedures Act[3], and violates due process of law and the taking of property for public use without just compensation protected by the Fifth Amendment to the Constitution.

This Court held in *Atlantic Refining Company* v. *Public Service Comm. of New York,* 360 U.S. 378, 391 (Catco), that "Section 7(e) requires the Commission to evaluate all factors bearing on the public interest", which holding was re-announced in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation,* 365 U.S. 1, 8. The latter case further held that the Commission's powers under Section 7 are limited to a veto of certificate applications exercisable only when "a balance of all the circumstances weighs against certification", Pg. 17. If these decisions have been overruled as to the Commission's obligations under Section 7, action of such consequence to the Commission and the gas industry should be explicitly stated rather than left to implication.

If the rule, i.e. "There is no statute that can be held to limit as suggested trial of an issue of confiscation" announced by this Court in *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 363, is not applicable to the Natural Gas Act, and this Court's holding in *Federal Power Commission* v. *Natural Gas Pipeline Company of America,* 315 U.S. 575, 583, i.e. "The first prerequisite to an order of the Commission is that it shall be preceded by a hearing and

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[2] 15 U.S.C. 717-717w.

[3] 5 U.S.C. 1001-1011, Sec. 1009(e).

order" does not mean the full and fair hearing contemplated in *Morgan* v. *United States,* 304 U.S. 1, all parties should be so advised. If the administrative burden of quasi-judicial hearings under the Natural Gas Act is to be removed by employment of administrative expertise and convenience, it is earnestly prayed that the Court clearly so hold in order that the gas industry may reasonably plot its future course.

3. That this is a so-called "interim measure" is difficult to perceive. The order and judgment here are permanent. The Superior Oil Co. alone is required to refund permanently and forever over 8 Million Dollars. *Solely to accommodate administrative convenience and on the basis of nothing more than Commission expertise,* Superior individually is precluded from receiving its contracted prices until July 1, 1967 or until just and reasonable rates for the industry, not Superior, are determined for south Louisiana. Whether these petitioners' proposed rates for these sales have been or are now required by public interest, or have been, or will be, just and reasonable as to them is not only not now to be determined but will never be considered by the Commission.

The above goes to the legal issues previously briefed, and they will not be further argued herein, but on the above basis, and the prior briefs, rehearing of the Court's decision of December 7, 1965 is respectfully prayed.

B. This Court erred in affirming the Commission's in-line price finding.

In addition to the foregoing, there is another matter determined by this Court's decision which Superior did not brief before, and which, in any event, it feels the Court's decision is in error and should be reheard. This has to do with the Court's holding that 18.5¢ per MCF is the "in-line" price level in south Louisiana.

1. Superior did not cover this point in its brief in reliance on Rule 23(1)(c) of the Court and decisions such as *Mazer* v. *Stein,* 347 U.S. 201, 208. Its position was that since this issue, i.e., the *level* of "in-line" price, was not included in the questions presented in the several Petitions for Writs of Certiorari which were granted, and was not reached by the court below, the same would not be considered. Mention of such issue in a footnote on the last page of the Commission's Petition was not believed to meet the Court's rule; however, opportunity was requested to file a supplemental brief if the Court should conclude to consider that issue. This request was not granted and therefore this belated opportunity is employed.

Initially it is to be noted that the *only evidence* in this entire record of prices contracted for, certificated or paid, is that contained in Exhibit X-42 (R. 286-298) and the related testimony of the witness, Dr. J. Rhoads Foster. Said exhibit and testimony are found at R. 281-299, both inclusive.

The holding that 18.5¢ per MCF[4] is the in-line price level appears to be based on the finding that such is supported by contract prices in south Louisiana under which *substantial amounts* of gas have been *contemporaneously certificated* and which are *not suspect;* and that it is a price necessary to prevent entrance into the interstate market at *prices higher than existing levels.* We examine below these emphasized matters and show that the holding is erroneous on this record.

2. *Substantial Amounts.* Relative to *"Substantial Amounts"* for in-line comparable price, it is assumed that

[4] Exclusive of tax reimbursement. References hereinafter to price, or initial base price, are also exclusive of tax reimbursement, which item is treated separately under that heading, unless stated otherwise.

a substantial amount of gas is one substantial in relation to the entire amount of gas sold in the period under consideration, rather than only substantial in an absolute sense. This is the approach adopted in considering that "substantial evidence" which will require affirmance of an administrative finding, i.e., it must be substantial in the light of the whole record made. Cf. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 456, 490; *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 508; *United States* v. *Carlo Bianchi and Co.,* 373 U.S. 709, 714, 715.

The Examiner (R. 506) and the Commission (R. 558), after eliminating all prices above 18.5¢ per MCF as suspect, found that there were 47 contracts executed in 1957 with volumes of 56.5 M²mcf, and 59 contracts executed in 1958 with volumes of 70.5 M²mcf at initial base prices of 18.5¢ per MCF or lower. Further, that in the *Catco*[5] decision on remand (Opn. No. 351) it had been found that of contracts dated between July 1, 1954 and June 30, 1956 (prior to the original erroneous *Catco* decision in June 1957), out of total 1958 deliveries of 241.2 M²mcf, only 63.9 M²mcf were sold at prices above 18¢ per MCF. Relative to the last part of this finding, it is noted that Superior was not a party to the *Catco* case. Under this Court's holding reversing the original Commission decision, 360 U.S. 378, 393-4[6], a related proceeding record (here there is no relationship) was held wholly insufficient to support a Commission finding. If such were not the law, the data presented in the remanded *Catco* hearing (Opinion No. 351) would be totally unreliable here because the cut-off date of that data was June 1956, or a year and one-half prior to these 1958 contracts. Initial prices in 1954 contracts were

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[5] Continental Oil Co., et al., 27 FPC 592.

[6] *Atlantic Refining Company, et al.* v. *Federal Power Commission.*

no doubt considerably increased by 1958. This record does not include a specific showing on this; however, Exhibit X-42, Schedule 5, R. 295, does show that the weighted average initial price for 1958 contracts was 2.3¢ per MCF *in excess of the 18.2¢* weighted average initial price for *1956 contracts.*

Returning to the 47 contracts in 1957 and the 59 contracts in 1958 relied on by the Commission. These numbers are misleading.

In 1957 there were 116 new contracts, which covered volumes of 207.0 M²mcf. Only *17* such contracts provided initial base prices of 18.5¢ per MCF (14.66% of the number of contracts) and under these 17 contracts only 31.7 M²mcf of gas (15.3% of the volume of gas sold under 1957 contracts) was covered. By contrast, in the same year there were *29* contracts with initial base prices of 21.5¢ per MCF (25% of all contracts for that year) under which 44.5 M²mcf of gas was sold (21.5% of all volumes sold under 1957 contracts) [Exhibit X-42, Schedule 3, Col. (g) and Schedule 4, Col. (g), R. 291, 293].

In 1958 there were 139 new contracts which covered 261.1 M²mcf of gas sold. Only *26* such contracts provided initial base prices of 18.5¢ per MCF (18.7% of the number of contracts) and these contracts covered only 39.5 M²mcf of gas (15.1% of the total gas volumes). By contrast during the same year there were *43* contracts with initial base prices of 21.5¢ per MCF (30.9% of the total number of contracts) which covered 112.8 M²mcf of gas sold, or 43.2% of the total gas volumes under all 1957 contracts. [Exhibit X-42, Schedule 3, Col. (h) and Schedule 4, Col. (h), R. 291, 293.]

Certainly contracts at 18.5¢ per MCF *and lower* are not support for an 18.5¢ per MCF price line. If "and lower" contracts are to be considered at all, they must be com-

pared against all contracts at 18.6¢ per MCF and higher. Exhibit X-42, Schedule 7, Line 1, R. 297, shows this relationship. For each of the years 1957 and 1958 only 25% of total volumes of such contract vintage was sold as low as 18.5¢ per MCF and 75% of all volumes was thus at higher prices, the median prices being 20.3¢ per MCF in 1957 and 21.5¢ per MCF in 1958; 25% of all volumes for both years was sold at 21.5¢ per MCF.

No matter how approached, 1957 and 1958 contracts with 18.5¢ per MCF initial base prices, or 18.5¢ per MCF and lower, did *not* cover substantial amounts of gas relative to amounts sold under all contracts of such vintage. No theory yet announced, at least to our knowledge, has ever deemed *volumes* of gas "suspect".

3. *Suspect Prices.* It is held that "suspect" prices are not to be considered for "in-line" price determination, but what makes a price suspect has never been spelled out. It certainly behooves this Court to announce what makes a price a "suspect" price. The Commission has said all prices over 18.5¢ per MCF are suspect. Such must be a subjective reaction and is apparently so acknowledged by the Commission agreement with the Examiner's statement, i.e., "it is reasonable to *assume* that the line would have been held at 18.5¢ per MCF in a substantial portion of the *other* contracts executed in 1957 and 1958" but for the erroneous *Catco* decision in June of 1957 (R. 558, emphasis added). This so-called "reasonable" assumption is repudiated by the record. Between 1953 and 1960 the increase in the highest of south Louisiana prices was only 12.5% and the weighted average price increase was only 22%, while during this period drilling costs for new gas increased 52% (R. 284-285). The reasonable assumption *from the record* is that prices increased due to constantly increasing costs,

not because of any Commission action — erroneous or otherwise.

Further, this record shows that in 1952, 12% of all volumes contracted for that year were sold at 20¢ per MCF; in 1953, 25.7% of all volumes contracted for were sold at 20¢ per MCF; and in 1955, 17.4% of all volumes contracted for were at 20¢ per MCF. In 1956, 24.3% of all volumes contracted for were at 21.1¢ per MCF to 21.4¢ per MCF (and an additional 5.1% at 20¢ per MCF). (Exhibit X-42, Schedule 3, R. 291) All of these prices are permanently certificated and beyond review. Only by the Commission's unfounded assumption can they be deemed suspect. It cannot be argued, much less assumed, that prices certificated *through 1956* were affected by an erroneous Commission order *made eighteen months later.*

In 1957 with only 15.3% of contracted volumes at 18.5¢ per MCF, 10.9% of the volumes were at 20¢ per MCF, 20.4% at 20.1¢-20.9¢ per MCF, 10.8% at 21.1¢-21.4¢ per MCF, and 21.5% at 21.5¢ per MCF. (R. 291, *supra*) Speculation alone will permit assumption of what part, if any, of these 1957 prices were influenced or affected by the erroneous Commission decision in *Catco* in June of that year, but based on 1956 prices alone when over 30% of all gas contracted for that year was at 21.5¢ per MCF or higher, the "in-line" price must be at that level.

"Suspect" was first applied to certain prices by the Ninth Circuit Court of Appeals in *United Gas Improvement Company* v. *Federal Power Commission,* 283 F. 2d 817 (1960). There, in a case involving one of the instant sales and remanding the Commission certificate order, it was pointed out that prices in certificate orders *then* subject to judicial review were subject to modification and thus could not be relied on to determine a line of prices. It was held further:

> "Where a substantial number of certificated prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect"

and ought not to be relied on in fixing a line

> "except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending proceedings." (Pg. 824)

The Commission, and Petitioners supporting its orders here, argue that judicial vacation of any certificated price renders all like prices "suspect", and such like prices cannot be shown to be without the same infirmities except by a showing that present reconsideration by the Commission would reach the prior result. This is, of course, not only impracticable but impossible. It would require a retrial of every case whose price is to be used in determining a price line. This burden would exceed that of determination of the "just and reasonable" rate. This very contention the Ninth Circuit in the same case expressly repudiated:

> "Where such denial of the right to participate in prior proceedings has not been judicially challenged, the fact of denial should not preclude the Commission from referring to the initial price therein certificated in the process of fixing a line in a subsequent proceeding. This is true because if not judicially challenged a Commission order excluding participation by others must be taken as correct." (283 F. 2d at 825).[7]

The statement last quoted was with specific reference to 16 schedules certificated in five separate proceedings where

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[7] The *concurrency of contest* necessary to render a price "suspect" was reiterated in a decision of the Ninth Circuit rendered since oral argument here. *People of State of Calif., et al.* v. *Federal Power Commission,* No. 19647, Nov. 9, 1965, not yet reported (Opn. P. 9).

United Gas Improvement Company (UGI) and New York Public Service Commission (New York) were denied the right to participate. In the case mentioned in the footnote, *Trunkline Gas Company, et al.* 22 FPC 110, judicial review resulted in affirmance of the Commission certificate order. *Public Service Comm. of New York* v. *Federal Power Commission* (C.A. D.C. 1960), 284 F. 2d 200.

These permanently certificated prices referred to in the Ninth Circuit Court's opinion are included on Schedule 7, Line 7 of Exhibit X-42 (R. 297). All are either no longer subject to judicial review or were affirmed on review. Under the Ninth Circuit's decision these prices particularly are "not precluded" from consideration for "in-line" pricing in subsequent proceedings. They with all other permanently certificated prices in 1957 and 1958 contracts, show a median price of 20.3¢ per MCF in 1957 and 19.0¢ per MCF in 1958 with weighted average prices for said years of 19.7¢ per MCF and 19.8¢ per MCF, respectively. This schedule also shows that 25% of the volumes sold under 1957 and 1958 contracts were at prices of 21.3¢ per MCF in 1957 and 22¢ per MCF in 1958. These are prices the Ninth Circuit Court expressly held were *not* suspect; yet they are the same prices which on remand the Commission "reasonably assumed" were suspect solely because the price exceeded 18.5¢ per MCF. On the basis of Commission certificated prices no longer subject to judicial review and not subject to modification or collateral attack, the "in-line" price in 1957-1958 must be between 21.3¢ per MCF and 22.0¢ per MCF.

The preeminence of this Court is not questioned, but we believe there was no intention here to remove the Commission from the usual agency obligation on remand to follow the directions of the remanding court. *Federal Power Commission* v. *Pacific Light and Power Co.*, 307 U.S. 156, 160,

held a remanding court's judgment to be "final and indisputable" Cf. *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 38.

A following of an "in-line" price concept has no relation whatsoever to that of following precedent. Certainly the Commission, as this Court, is free to depart from or overrule its prior decisions. But the departing decision must still be related to the applicable law and the record evidence. The "in-line" price concept is at best an artificial formula to be objectively used. It cannot properly be juggled. Based on non-suspect orders for contemporaneous contracts, the "line" of prices must be between 21.3¢ per MCF and 22¢ per MCF.

4. *Contemporaneous Settlement Dockets.* The Commission Opinion (R. 351) shows that during and immediately preceding this hearing, the Commission in approximately 60 dockets, otherwise on all fours with the present 13 dockets, entered permanent certificate orders on a settlement basis. These orders certificated prices of 20.625¢ per MCF for sales where state severance tax is payable, and 19¢ per MCF for other sales in the south Louisiana area (see R. 477-481 for type of order). The volumes of these 60 sales is not disclosed, but undoubtedly is greater than that of the 43 sales at 18.5¢ per MCF which the Commission found "substantial". Surely it cannot be argued that these orders are "suspect" and no other orders are *as* contemporaneous. They must represent the *minimum* level of existing prices *then* being certificated. That they were settlements does not detract from the findings made that they were required by present and future public convenience and necessity. Yet, compare them with the instant order.[8] They required refund

[8] Settlement offer, R. 472-476, Commission order, R. 477-481, related to Sun Oil Co., show the settlement format.

of only ⅔ of the amounts collected prior to January 1, 1962 but Superior is required to refund 100%. They placed the refund floor at .625¢ per MCF and .5¢ per MCF higher than the refund floor fixed for Superior's sales. They provided for the identical moratorium period. These orders specifically repudiate any finding that the instant "in-line" base price is 18.5¢ per MCF. We must "reasonably assume" the Commission did not deliberately certificate "out-of-line" prices. The in-line price here could in no event be less than 20.625¢ per MCF, including tax reimbursement, for onshore south Louisiana gas, and 19¢ per MCF for offshore south Louisiana gas, based on Commission orders in other cases so similar to the instant dockets that at one time all were consolidated for hearing.

5. *Prices higher than existing levels.* The Court's opinion throughout reflects the feeling that consumer protection is adequate only if the price line is "held". Thus new gas prices should not exceed existing price levels. Accepting this, the 18.5¢ per MCF price is still not supportable on this record. It is much below existing price levels in 1957 and 1958.

If Commission expertise or its pleading[9] are deemed conclusive, in 1959 more than 84 billion cubic feet of gas was being sold *with Commission consent* at prices of 23.55¢ per MCF including tax. (R. 439). Thus, the present Commission order, and this Court's affirmance, fixing the lesser rate of only 18.5¢ per MCF or 20¢ per MCF is far below the *existing price level* and is clearly unjust, unfair, and discriminatory to Superior.

6. *Tax Reimbursement.* Above we have shown that the Commission's finding that the base "in-line" initial price of

[9] Staff Memorandum of Position, R. 439.

18.5¢ per MCF is not supportable on this record. The tax reimbursement allowed, where state severance taxes are collected, is, if possible, even less supportable. The allowance is only 1.5¢ per MCF. Recalling that *the only* evidence is that shown in Exhibit X-42, and the related testimony (R. 281-299), it is apparent that the finding of 1.5¢ per MCF is *contrary to the undisputed record,* Schedule 6 of Exhibit X-42 (R. 296), Part II "Other Contracts dated 1957 and 1958", and see R. 281-282. Even for initial base price contracts made in 1957 and 1958 at 18.5¢ per MCF *or less,* the tax reimbursement on a weighted average was 1.69¢ per MCF. For such contracts with prices between 18.6¢ and 21.4¢ per MCF the weighted average reimbursement was 1.85¢ per MCF and for those of 21.5¢ per MCF the weighted average tax reimbursement was 2.01¢ per MCF. Over 56% of all the gas sold under 1957 and 1958 contracts provided for weighted average tax reimbursement ranging from 1.85¢-2.01¢ per MCF. The "in-line" tax reimbursement in contemporaneously certificated contracts with comparable initial base rates is 2.01¢ per MCF. This may seem like a *de minimis* matter. Such is not the case — ½¢ per MCF makes a difference of more than $1,000,000 to The Superior Oil Company alone.

Only by reference to the record in its Opinion No. 351 (R. 560-561) does the Commission even pretend to support its 1.5¢ per MCF tax reimbursement for in-line pricing. This Court's decision in *Catco,* 360 U.S. 378, repudiates use of a foreign record proceeding to support a Commission finding. No amount of expertise or discretion should allow the Commission to find contrary to all of the evidence in the case being decided.

C. Conclusion

In conclusion, it is respectfully submitted that this Honorable Court erred in reversing the Court below, and it is further submitted that it erred even more grievously in affirming the Commission's determination of the applicable in-line price applicable to these proceedings. Rehearing of the Courts decision of December 7, 1965 is prayed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, H. W. VARNER, counsel for The Superior Oil Company, hereby certify that the foregoing Petition for Rehearing is presented in good faith, and is not interposed herein for delay.

Service hereof has been made this day by mailing copies to all counsel as provided in Rule 33 of the Court.

Certified at Houston, Texas, this 22nd day of December, 1965.

.....
H. W. Varner